No. 19-_____

IN THE
Supreme Court of the United States

FLORENCE BIKUNDI,
Petitioner,

v.

UNITED STATES OF AMERICA
AND MICHAEL D. BIKUNDI, SR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court granting an ends-of-justice continuance under the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(7)(A), violates the requirement that the court set forth its reasons for "such continuance" when it sets forth adequate reasons only for earlier continuances.

2. Whether, at the sentencing of a fraud defendant whose conduct the district court found included both "pervasive" fraud and legitimate activities, the government retains the burden of proving the specific scope of the fraudulent conduct that results in loss under the Sentencing Guidelines, restitution, and forfeiture.

PARTIES TO THE PROCEEDINGS

Petitioner Florence Bikundi was a defendant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent United States of America initiated the proceedings in the district court and was the appellee in the court of appeals proceedings.

Respondent Michael D. Bikundi, Sr. was a defendant in the district court proceedings and an appellant in the court of appeals proceedings.

Christian S. Asongcha a/k/a Chris Asong; Melissa A. Williams; Elvis N. Atabe; Carlson M. Igwacho; Irene M. Igwacho; Bernice W. Igwacho; and Atawan Mundu John were defendants below but did not participate in the trial or court of appeals proceedings, except, in some cases, as trial witnesses.

RELATED PROCEEDINGS

The following reflects related cases pertaining to the various defendants named in the December 18, 2014 Superseding Indictment:

1. *United States v. Florence Bikundi*, No. 14-CR-30 (D.D.C.), judgment entered June 3, 2016 (ECF #544)

2. *United States v. Michael D. Bikundi, Sr.*, No. 14-CR-30 (D.D.C.), judgment entered June 3, 2016 (ECF #542)

3. *United States v. Christian S. Asongcha*, No. 14-CR-30 (D.D.C.), pending

4. *United States v. Melissa A. Williams*, No. 14-CR-30 (D.D.C.), judgment entered May 27, 2016 (ECF #532)

5. *United States v. Elvis N. Atabe*, No. 14-CR-30 (D.D.C.), judgment entered June 10, 2016 (ECF #555)

6. *United States v. Carlson M. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered June 10, 2016 (ECF #557)

7. *United States v. Irene M. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered May 20, 2016 (ECF #521)

8. *United States v. Berenice W. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered April 25, 2016 (ECF #505)

9. *United States v. Atawan Mundu John*, No. 14-CR-30 (D.D.C.), pending

10. *United States v. Florence Bikundi*, No. 15-3013 (D.C. Cir.), judgment entered March 25, 2015

11. *United States v. Michael Bikundi, Sr.*, No. 16-3066 (D.C. Cir.), judgment entered June 11, 2019

12. *United States v. Florence Bikundi*, No. 16-3067 (D.C. Cir.), judgment entered June 11, 2019

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Petitioner Florence Bikundi petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-68a) is reported at 926 F.3d 761. The memorandum opinion of the district court denying petitioner's motion for judgment of acquittal or, alternatively, new trial (App. 98a-225a) is not reported.

JURISDICTION

The court of appeals entered its judgment on June 11, 2019, and denied a petition for rehearing on October 4, 2019 (App. 226a-227a). On December 11, 2019, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including March 2, 2020. App. 235a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A *et seq.*, and the criminal forfeiture statute, 18 U.S.C. § 982, are reproduced at App. 228a-234a.

INTRODUCTION

The D.C. Circuit's decision below abandoned the plain text of the Speedy Trial Act of 1974, holding that a district court is not required to set out its findings "each time" it grants an ends-of-justice continuance, App. 13a,[1] even though the statute requires a court granting a continuance to set forth on the record its reasoning for "such continuance," 18 U.S.C. § 3161(h)(7)(A). The D.C. Circuit's rule conflicts with that of the Tenth Circuit, which recognizes that the Act requires "specific, nonconclusory" support for each and every continuance. *United States v. Hernandez-Mejia*, 406 F. App'x 330, 337 (10th Cir. 2011).

When petitioner was finally tried, she was convicted of fraud and money laundering in connection with a company that provided non-medical home aide services covered by Medicaid. At sentencing, the district court expressly acknowledged evidence demonstrating that petitioner's company had provided legitimate services. *See* C.A. App. 1830 (6/1/16 Sent. Tr. 33) ("There was testimony presented at trial about legitimate services being both needed and provided"). Despite that acknowledgement, the court shifted the burden to petitioner to quantify the value of the legitimate services, presuming that any services petitioner could not prove to be legitimate were fraudulent. Because petitioner failed to meet that burden, and because the district court found that petitioner's fraud "permeated" the company, *id.* at 1833 (6/1/16 Sent. Tr. 36); *see also* App. 40a, the district court used the full value of the business – both legitimate and not – as the loss for purposes of the Sentencing Guidelines,

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[1] Citations to "App. __a" are to the appendix bound together with this petition; citations to "C.A. App. __" are to the joint appendix filed in the D.C. Circuit.

and ordered petitioner to pay restitution for that value and to forfeit the company's entire proceeds.

On appeal, the D.C. Circuit sustained the district court's burden-shifting, which is also employed in the Fifth Circuit, *see United States v. Mazkouri*, 945 F.3d 293, 304 (5th Cir. 2019). But this approach conflicts with the text of the Guidelines and the relevant statutes, as well as the rule in the Ninth Circuit, which properly enforces the government's burden to prove the precise scope of a charged fraud. As the Ninth Circuit has said, "permeated with fraud" is a conclusion "too indefinite and conclusory to support a sentence." *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997).

Both questions presented are important and recurring, and they warrant this Court's review.

STATEMENT

On February 21, 2014, petitioner Florence Bikundi was arraigned on charges of fraud and money laundering. *See* C.A. App. 82-86 (Indict. ¶¶ 57-65), 979 (2/21/14 Hr'g Tr. 2). The charges arose from the operations of Global Healthcare Services ("Global"), a company owned by Ms. Bikundi. *See id.* at 1160 (10/16/15 PM Tr. 105 (Mbide)). Global provided non-medical home aide services, the cost of which was reimbursed by Medicaid. *See id.* at 1079, 1082 (10/15/15 PM Tr. 14, 17 (Shearer)), 1117-18, 1120 (10/16/15 AM Tr. 45-46, 48 (Mebane)). The Speedy Trial Act required Ms. Bikundi to be tried within 70 days, unless the trial was delayed for one or more of the permissible reasons enumerated in the statute. *See* 18 U.S.C. § 3161(c)(1), (h). On December 18, 2014, Ms. Bikundi's 300th day in pretrial detention, the grand jury returned a superseding indictment adding additional similar charges against Ms. Bikundi and

adding Michael D. Bikundi, Sr., her husband and a Global employee, as a defendant. *See* C.A. App. 115-21, 123-33 (Superseding Indict. ¶¶ 68-75, 79-91).

After being detained without trial for more than 16 months, Ms. Bikundi moved to dismiss the charges against her for violation of the Speedy Trial Act. Much of the delay had resulted from five ends-of-justice continuances the district court granted before the superseding indictment was returned. Delay caused by such a continuance is permissible only if "the court sets forth . . . its reasons for finding that the ends of justice served by the granting of *such continuance* outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). Ms. Bikundi argued that the continuances were improper because the court had not made findings that satisfied the Speedy Trial Act. The district court denied the motion on July 31, 2015. *See* C.A. App. 1029-49 (7/31/15 Hr'g Tr. 98-118).

The evidence at trial showed that petitioner's company eventually employed more than 700 home aides serving more than 800 clients. *See id.* at 511-41 (GX29 (client roster)), 1345 (10/21/15 PM Tr. 74 (Atabe)). The government's witnesses – a handful of employees and clients – agreed that the company's aides provided legitimate services but also at times submitted inflated timesheets. For example, the company's human resources coordinator testified that only 25 home aides, less than 5% of the total, falsified their timesheets. *See* 10/29/15 PM Tr. 79-80 (Williams), ECF #334; 11/2/15 Tr. 102 (Williams), ECF #338. No witness testified, and the government did not argue, that *no* legitimate Medicaid beneficiary ever received services. On November 12, 2015, petitioner was found guilty of conspiracy, in violation of 18 U.S.C. § 1349; the

submission of fraudulent claims to D.C. Medicaid, in violation of 18 U.S.C. § 1347; money laundering conspiracy, in violation of 18 U.S.C. § 1956(h); and money laundering to conceal the nature of funds, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Ms. Bikundi was also convicted of concealing her exclusion from federal programs, in violation of 18 U.S.C. § 1347 and 42 U.S.C. § 1320a-7b(a)(3). The jury acquitted petitioner on three counts of conducting monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. § 1957.

At sentencing, on June 1, 2016, the district court acknowledged that "[t]here was testimony presented at trial about legitimate services being both needed and provided." C.A. App. 1830 (6/1/16 Sent. Tr. 33). The government did not quantify the company's fraudulent bills, and petitioner did not quantify its legitimate bills. The court nonetheless based petitioner's sentence on the entire $80 million that petitioner's company received from D.C. Medicaid from 2009 to 2014, reasoning that petitioner's fraud "permeated" the company. *See id.* at 1609-10 (11/3/15 AM Tr. 107-08 (Brooks)), 1833 (6/1/16 Sent. Tr. 36); *see also* App. 40a.

That $80 million loss calculation increased petitioner's adjusted offense level under the Sentencing Guidelines by 28 points. *See* C.A. App. 1853 (6/1/16 Sent. Tr. 87); U.S.S.G. § 2B1.1(b)(1)(M), (b)(7). The district court sentenced Ms. Bikundi to 5 years of imprisonment on one count and 10 years of imprisonment on each of the others, to be served concurrently. App. 69a, 72a (Judgment at 1, 3).

The district court also ordered petitioner to pay approximately $80 million in restitution to D.C. Medicaid and entered forfeiture money judgments against

petitioner and Mr. Bikundi, who had been convicted at the same trial, of approximately $40 million each. *See* C.A. App. 294 (F. Bikundi Prelim. Order of Forfeiture at 6), 304-05 (M. Bikundi Prelim. Order of Forfeiture at 5-6), 333 (F. Bikundi Final Order of Forfeiture at 3), 337 (M. Bikundi Final Order of Forfeiture at 3); App. 76a-77a, 79a-80a (F. Bikundi Judgment at 5, 7).

On appeal, Ms. Bikundi challenged three of the five ends-of-justice continuances granted by the district court between her initial arraignment and the return of the superseding indictment. App. 10a-11a. She argued that, although the district court had made the findings required by the Speedy Trial Act when it granted the first two continuances, it had not done so for the latter three. *Id*.

The court of appeals rejected Ms. Bikundi's claim and affirmed her conviction. It reasoned that "the court does not understand the statute to require the district court to repeat all of the details of its findings on the record each time it grants an ends-of-justice continuance, particularly where the charged offenses indicate why discovery would be prolonged." App. 13a.

Petitioner also challenged her sentence on appeal, arguing that she could not be held liable for the full amount paid by D.C. Medicaid, given the undisputed evidence that legitimate services were provided. App. 39a-40a. The court of appeals affirmed the sentence, relying on the district court's conclusion that petitioner's fraud "permeated" her company's operations. App. 40a. The D.C. Circuit concluded that, in the context of "pervasive" fraud, the burden shifts to defendants to prove the scope of their non-fraudulent business, and that petitioner had not done so. App. 41a, 44a, 53a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Speedy Trial Act Holding Conflicts with Tenth Circuit Law and the Act's Text

A. The D.C. Circuit's Speedy Trial Act Holding Conflicts with Tenth Circuit Law

The courts of appeals disagree as to whether the Speedy Trial Act requires district courts to record factual findings supporting each ends-of-justice continuance they grant.

The Act provides that trial must begin within 70 days of the initial indictment's filing or the defendant's arraignment, whichever is later. *See* 18 U.S.C. § 3161(c)(1). It permits delays for several specified reasons. As relevant here, it permits delay upon the district court's determination that the ends of justice require a continuance. *See id.* § 3161(h). The Act provides that no delay resulting from "a continuance" granted for the ends of justice may be excluded from calculating the 70-day period "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of *such continuance* outweigh the best interests of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A) (emphasis added). It also sets out several "factors, among others, which a judge shall consider" in deciding whether to grant an ends-of-justice continuance and identifies two grounds that may not be used to justify a continuance. *Id.* § 3161(h)(7)(B), (C).

"[I]f a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be

dismissed." *Zedner v. United States*, 547 U.S. 489, 508 (2006). Although complexity is one of the required considerations listed in the Act, the Act "is not satisfied by the District Court's passing reference to the case's complexity." *Id.* at 507. The Act "requires" an on-the-record explanation of why the court finds both "that the ends of justice are served" by the continuance and that those ends "outweigh other interests" in a speedy trial. *Id.* at 506. The "strategy" of the Act's ends-of-justice provision "is to counteract substantive openendedness with procedural strictness." *Id.* at 509.

In this case, the district court relied solely on a passing observation that the case was "complex" to justify three of its five ends-of-justice continuances. When entering the first two continuances, the court did balance the necessary interests.[2] But when entering the third, fourth, and fifth continuances, the court merely noted its earlier determination that the case was complex; it did not acknowledge the countervailing interests of the defendant and the public in a speedy trial, and it did not weigh the complexity of the case against those countervailing interests.[3]

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[2] *See* C.A. App. 983 (3/7/14 Hr'g Tr. 5) (finding that interest of justice supported exclusion of time and that "it's in the interest of justice to do so and that those interests outweigh the interests of the parties and the public in a speedier trial"); *id.* at 985 (4/24/14 Hr'g Tr. 9) ("I find it in the interest of justice to [exclude time], and that those interests outweigh the interests of the public and Miss Bikundi in a speedier trial.").

[3] *See* C.A. App. 991 (6/16/14 Hr'g Tr. 52) ("All right. Well, I am going to exclude time under the Speedy Trial Act on the grounds that this is – between today and July 25, given the complexity of the case and the amount of discovery. Now, I know typically the complexity of the case will exclude speedy trial time for basically the duration. I am only going to exclude the time until the next status conference on July 25 because I know that everybody's

The D.C. Circuit approved all five continuances on the strength of the findings supporting the first. The court described the district court's findings in connection with the first continuance and noted that the district court had properly weighed the relevant interests at that time. App. 13a-14a. The court then concluded that the subsequent continuances were proper because "the court does not understand the statute to require the district court to repeat all of the details of its findings on the record each time it grants an ends-of-justice continuance, particularly where the charged offenses indicate why discovery would be prolonged." App. 13a.

In analogous circumstances, the Tenth Circuit reached the opposite conclusion. In *United States v. Hernandez-Mejia*, 406 F. App'x 330 (10th Cir. 2011), the district court granted several ends-of-justice continuances. *See id.* at 331. The court later denied the defendant's motion to dismiss for violation of the Speedy Trial Act, noting its early designation of the case as complex. *See id.* at 333. On appeal, the Tenth Circuit accepted that the case was complex and assumed that the designation was sufficient to justify

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working hard on reviewing the discovery and the documentation and arranging for the most expeditious way to get discovery into the hands of defense counsel. Is there anything further?"); *id.* at 12 (Minute Order (July 22, 2014)) ("And the defendant having agreed to the exclusion of time under the Speedy Trial Act, and the Court finding that the best interest of justice will be served by its exclusion, it is FURTHER ORDERED that time under the Speedy Trial Act shall be excluded from 7/25/2014 to 9/5/2014."); *id.* at 1010 (9/5/14 Hr'g Tr. 22) ("THE COURT: Okay. Good. 9:30. And because this is a complex case, time under the Speedy Trial Act is tolled. Okay. We now have a schedule in place."); *id.* at 12 (Minute Order (Oct. 7, 2014)) ("It is FURTHER ORDERED that time under the Speedy Trial Act shall be excluded in the best interest of justice from 10/10/2014 to 10/31/2014.").

a six-week continuance after a new lawyer was appointed to represent the defendant. *See id.* at 337. But the court observed that three subsequent continuance orders "did not set forth any specific, nonconclusory, reasons why *further* continuances were necessary." *Id.* (emphasis added). It added that the order denying the motion to dismiss, which cited the case's complexity, "did not set forth any specific ends-of-justice findings pertaining to [several of] the continuance orders." *Id.* at 338. The Tenth Circuit reversed the district court's denial of the motion to dismiss and remanded for the district court to determine whether the indictment should be dismissed with or without prejudice. *Id.*

The D.C. Circuit and the Tenth Circuit squarely disagree whether the Speedy Trial Act requires a district court to set forth findings supporting each ends-of-justice continuance that it grants. The Tenth Circuit has held that a district court must justify and explain each continuance and cannot tacitly rely on a previous determination that the case is complex.[4] The D.C. Circuit has now held that a district court may tacitly rely on precisely that prior determination with

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[4] The Tenth Circuit's failure to publish its decision in *Hernandez-Mejia* is not a bar to review. The court relied on principles established in previous, published decisions. *See Hernandez-Mejia*, 406 F. App'x at 336 (quoting *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009) (district court must consider proper factors "at the time such a continuance was granted") (citation omitted); *United States v. Williams*, 511 F.3d 1044, 1056 (10th Cir. 2007) (record must "be clear" that district court "struck the proper balance when it granted the continuance") (citation omitted)). In any event, this Court has granted certiorari to settle circuit conflicts created by unpublished decisions. *See Crawford v. Metropolitan Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 275 (2009); *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000).

no further findings or explanations. This Court should settle the dispute so that criminal defendants' rights under the Speedy Trial Act do not vary based on geography.

B. The D.C. Circuit's Analysis of the Speedy Trial Act Is Erroneous

The Speedy Trial Act requires the district court to "set[] forth" the findings that support an ends-of-justice continuance *for each* "*such continuance*." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). There is no ambiguity in that command: each continuance must be supported by findings actually set forth in the record. The D.C. Circuit's decision is contrary to that plain text and this Court's previous decisions applying it.

This Court has recognized that the Speedy Trial Act has significant "substantive openendedness," against which it applies "procedural strictness." *Zedner*, 547 U.S. at 509. In *Zedner*, the district court granted an ends-of-justice continuance but failed to describe its reasoning on the record. This Court held that the district court's continuance failed to satisfy the Act's requirements: "without on-the-record findings, there can be no exclusion" of time from the 70-day clock. *Id.* at 507.

The D.C. Circuit's decision below conflicts with the Act's plain text and this Court's decision in *Zedner*. Under both the plain text and *Zedner*, an ends-of-justice continuance is valid only if the district court "sets forth" the reasons for that continuance. A passing reference to the district court's earlier determination that the case was complex, without any further findings or balancing of interests, does not "set[] forth" the reasons for a subsequent continuance. The D.C. Circuit's contrary holding is erroneous.

II. The D.C. Circuit's Sentencing Analysis Conflicts with Ninth Circuit Precedent and the Text of the Sentencing Guidelines and Restitution and Forfeiture Statutes

A. The D.C. Circuit's Sentencing Analysis Conflicts with Ninth Circuit Precedent

The courts of appeals also disagree as to the government's burden in proving the scope of a defendant's fraud when the district court calculates loss under the Sentencing Guidelines, restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"), and forfeiture under the criminal forfeiture statute. In particular, the courts of appeals are split as to whether the government may assert that a fraud is pervasive and thereby justify sentencing based on all of the defendant's activities – both fraudulent and legitimate.

An application note to the Sentencing Guidelines provides that, in a case involving fraud against a government health care program, "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted." U.S.S.G. § 2B1.1 cmt. n.3(F)(viii). The MVRA provides that "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." 18 U.S.C. § 3664(e). Finally, defendants must forfeit the "gross proceeds traceable to the commission of" health care fraud offenses, *id.* § 982(a)(7), and property "involved in" or "traceable to" money laundering offenses, *id.* § 982(a)(1).

At sentencing and on appeal, petitioner argued that, given the evidence that her company engaged in legitimate business, she could be sentenced under each of these provisions only for the volume of conduct that the government proved was actually criminal. The Sentencing Guidelines' presumption applies only to "fraudulent bills," not all bills. U.S.S.G. § 2B1.1 cmt. n.3(F)(viii). The MVRA explicitly places the burden of proving "the amount of the loss" on the government. 18 U.S.C. § 3664(e). And the forfeiture statute reaches "proceeds traceable to" the fraud offense, *id.* § 982(a)(7), and property "involved in" or "traceable to" money laundering offenses, *id.* § 982(a)(1).

The D.C. Circuit held that, under each sentencing scheme, if the government shows that the fraud is "pervasive," the burden shifts to the defendant to prove the value of non-fraudulent services – despite the undisputed existence of legitimate services. *See* App. 41a ("[T]he prosecution may rely on the existence of a pervasive fraud to argue that all services were infected by fraud in some way, and therefore that payments for all services represent loss under the MVRA."), 44a (full value of payments forfeitable because of "the pervasive fraud"), 53a (for purposes of loss, "the pervasive fraud . . . meant that approximately $80 million was fraudulently billed"). The Fifth Circuit has applied this standard as well. *See United States v. Mazkouri*, 945 F.3d 293, 304 (5th Cir. 2019) ("When fraud is so pervasive that separating legitimate from fraudulent conduct 'is not reasonably practicable,' 'the burden shifts to the defendant to make a showing that particular amounts are legitimate.'") (quoting *United States v. Hebron*, 684 F.3d 554, 563 (5th Cir. 2012)).

The Ninth Circuit has rejected this approach. In *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997), the defendant, a surgeon, was convicted of defrauding Medicare. *See id.* at 1275. To obtain payment, the defendant sometimes represented that procedures were medically necessary when they were not, billed for more expensive procedures than he performed, and committed other types of fraud. *See id.* at 1281-86. Even so, the defendant's employees "presented themselves at trial as doing honest work, only occasionally doing recording or billing against their honest judgment because of [the defendant's] overriding directions." *Id.* at 1289. The district court concluded that the defendant's medical practice was "permeated with fraud" and found a loss of "virtually the entire proceeds" of the practice. *Id.* at 1275, 1294.

The Ninth Circuit vacated the sentence, reasoning that "permeated with fraud" is a conclusion "too indefinite and conclusory to support a sentence." *Id.* at 1294. The court directed that on remand the defendant "must be given credit for the medical services that he rendered that were justified by medical necessity. As always, the burden is on the government to establish what services were not medically necessary." *Id.* The court similarly vacated the district court's forfeiture order because the government contended that "all" of the defendant's practice was a fraud but failed to prove it. *Id.* at 1293. The court vacated the district court's restitution order for other reasons, but it noted that on resentencing restitution could be ordered only "as to that portion of the defendant's conduct proved at trial to have directly harmed an insurer." *Id.* at 1294.

This Court should resolve the disagreement between the courts of appeals and clarify the proper approach

to all three sentencing components. The severity of a defendant's sentence should not depend on whether she is convicted in California or in the District of Columbia.

B. The D.C. Circuit's Sentencing Holding Is Erroneous

The D.C. and Fifth Circuits' position in this circuit split is incorrect on the merits. As noted above, the Sentencing Guidelines provide that the value of "fraudulent bills" is presumptively loss. U.S.S.G. § 2B1.1 cmt. n.3(F)(viii). As with any other fact that enhances a defendant's sentence,[5] the fraudulent nature of the bills must be proven by the government, not disproven by the defendant. The MVRA is even more direct, explicitly placing the burden of proving "the amount of the loss" on the government. 18 U.S.C. § 3664(e). Nothing in the statute authorizes burden-shifting. Finally, the forfeiture statute reaches "proceeds traceable to" the fraud offense, *id.* § 982(a)(7) – that is, proceeds of fraud, not proceeds of adjacent legitimate transactions – and property "involved in" or "traceable to" money laundering offenses, *id.* § 982(a)(1). In each aspect of sentencing, contrary to the D.C. Circuit's holding below, the government bears the burden of proving the extent of criminal conduct.

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[5] *See, e.g.*, *United States v. Heon Seok Lee*, 937 F.3d 797, 817 (7th Cir. 2019), *pet. for cert. pending*, No. 19-879 (U.S. Nov. 22, 2019); *United States v. Walker*, 900 F.3d 995, 998 (8th Cir. 2018) (per curiam); *United States v. Douglas*, 885 F.3d 124, 136 (3d Cir. 2018) (en banc); *United States v. Kent*, 821 F.3d 362, 368 (2d Cir. 2016); *United States v. Catone*, 769 F.3d 866, 877 (4th Cir. 2014); *United States v. Onyesoh*, 674 F.3d 1157, 1159-60 (9th Cir. 2012).

III. This Case Presents an Ideal Vehicle To Resolve Both Questions Presented

Both questions presented were squarely decided below in the district court and the court of appeals. Neither court provided alternative bases for its rulings. Further, ends-of-justice continuances that do not satisfy the Speedy Trial Act are not subject to harmless error review. *See Zedner*, 547 U.S. at 509.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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